

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF MASSACHUSETTS

In Re: )  
PHARMACEUTICAL INDUSTRY ) CA No. 01-12257-PBS  
AVERAGE WHOLESALE PRICE ) MDL No. 1456  
LITIGATION ) Pages 1 - 44

STATUS CONFERENCE  
BEFORE THE HONORABLE PATTI B. SARIS  
UNITED STATES DISTRICT JUDGE

United States District Court  
1 Courthouse Way, Courtroom 19  
Boston, Massachusetts  
June 6, 2007, 10:00 a.m.

LEE A. MARZILLI  
OFFICIAL COURT REPORTER  
United States District Court  
1 Courthouse Way, Room 3205  
Boston, MA 02210  
(617)345-6787

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## 1 A P P E A R A N C E S:

2 For the Plaintiffs:

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5 Suite 2900, Seattle, Washington, 98101-1090.6 THOMAS M. SOBOL, ESQ., Hagens Berman Sobol Shapiro LLP,  
7 One Main Street, Cambridge, Massachusetts, 02142.8 DONALD E. HAVILAND, ESQ., The Haviland Law Firm, LLC,  
9 740 S. Third Street, Third Floor, Philadelphia, Pennsylvania,  
10 19102.

11 For the Defendants:

12 LYNDON M. TRETTER, ESQ. and THOMAS J. SWEENEY, III,  
13 Hogan & Hartson, 875 Third Avenue, New York, New York, 10022,  
14 appearing for Bristol-Myers Squibb.15 THOMAS E. DWYER, JR., ESQ., Dwyer & Collora, LLP,  
16 600 Atlantic Avenue, Suite 1200, Boston, Massachusetts,  
17 02210, appearing for Bristol-Myers Squibb18  
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1 Is that what you view as on the table?

2 MR. SOBOL: Yes, your Honor, and I just want to  
3 check, if you don't mind, your Honor. Mr. Berman, can you  
4 hear what's going on?

5 MR. BERMAN: I can, your Honor.

6 MR. SOBOL: Nice.

7 THE COURT: Mr. Sobol was most impressed, to your  
8 deference.9 MR. TRETTER: I want to make three things clear at  
10 the outset, your Honor. We're not here seeking dismissal of  
11 the case because of the lack of class plaintiff. We are not  
12 here to seek a different trial date, to move it out, we're  
13 happy with the 23rd. And we're talking to Mr. Green. All of  
14 those things are going on. But we are here to talk about  
15 Mrs. Aaronson's claim, and this is something --16 THE COURT: Can I just back off just for one  
17 minute?

18 MR. TRETTER: Sure.

19 THE COURT: I'd be inclined just to allow them to  
20 add that woman. I shouldn't say "that woman," but --

21 MR. TRETTER: Mrs. Swayze.

22 THE COURT: Mrs. Swayze, and --

23 MR. TRETTER: Can I cut through, your Honor?

24 THE COURT: Yes.

25 MR. TRETTER: If the short answer is "yes," we're

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## 1 P R O C E E D I N G S

2 THE CLERK: In Re: Pharmaceutical Industry Average  
3 Wholesale Price Litigation, Civil Action No. 01-12257, will  
4 now be heard before this Court. Will counsel please identify  
5 themselves for the record.6 MR. SOBOL: Good morning, your Honor. Tom Sobol,  
7 Hagens Berman Sobol Shapiro, for the class plaintiffs. On  
8 the phone is Mr. Berman.9 MR. HAVILAND: Good morning, your Honor. Don  
10 Haviland, Haviland Law Firm, for the class plaintiffs.11 MR. DWYER: Your Honor, Thomas Dwyer for  
12 Bristol-Myers.

13 MR. SWEENEY: Thomas Sweeney for Bristol-Myers.

14 MR. TRETTER: And Lyndon Tretter for Bristol-Myers.

15 THE COURT: Good. Why are we here today?

16 MR. TRETTER: Well, your Honor, we sent a notice of  
17 a lack of class plaintiff.

18 THE COURT: Right.

19 MR. TRETTER: And that's why we're here, to discuss  
20 that and a few other housekeeping issues, hopefully, in  
21 anticipation of the trial on July 23 with respect to BMS.

22 THE COURT: Thank you.

23 MR. TRETTER: I just want to get a couple things  
24 out.

25 THE COURT: I just want to make sure I understand.

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1 inclined to do the same thing, subject to the same vetting  
2 process that every plaintiff has to go through. I mean, they  
3 gave us one EOB which has a lot --4 THE COURT: Well, jump in and watch it, but we're  
5 not going to change the trial date. The problem is, listen,  
6 listen, this case is so huge and so much has been happening,  
7 but you did just alert us to the issue or the possible issue  
8 a month before trial. Now, maybe that's when you thought  
9 about it, maybe that's when you thought about it, but I'm  
10 going to -- you'll just have to -- you've got troops of  
11 lawyers, so somebody will just have to go in and look at it  
12 before the --13 MR. TRETTER: I'm happy to do that. If that's the  
14 answer today, we can cut through and we can move on to the  
15 other things. I just want the Court to be aware that, you  
16 know, when we get this information, it is possible that  
17 Mrs. Swayze -- is that the correct pronunciation of her  
18 name?

19 MR. SOBOL: Yes.

20 MR. TRETTER: -- may have a problem too. I just  
21 noted on the EOB that I received, the explanation of benefit  
22 form that I received 5:00 o'clock last night, that she  
23 received her chemotherapy in 2003. The benefit form was  
24 processed in 2007. There are all sorts of things that may be  
25 very strange about this situation.

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1 THE COURT: Fine. I am simply saying, after five  
2 years of litigation or longer, if I have to continue it again  
3 to get someone, I will because these people are all old and  
4 they're all dying and they have bad memories.

5 MR. TRETTER: I agree with that, your Honor, but  
6 we're --

7 MR. BERMAN: Your Honor, this is Steve Berman. Can  
8 I pitch in for one second?

9 THE COURT: Yes.

10 MR. BERMAN: I appreciate that you're going to  
11 allow us to add Mrs. Swayze, and we'll make her available for  
12 deposition. There's two issues, though, that I think that  
13 are raised by this. One is that we still contend -- and I  
14 don't know that you want to resolve it today, and we briefed  
15 this in the pleading we filed yesterday -- that the claims of  
16 these class members still go through 2004.

17 THE COURT: I know that's your position, and when I  
18 saw your brief, which I actually didn't read till this  
19 morning because I was busy yesterday afternoon, the bottom  
20 line is, I don't know, and I have to think about that.

21 MR. BERMAN: Okay. And the second issue is --

22 THE COURT: I just have to say, both sides have a  
23 good point. On the one hand, you're saying I only resolved  
24 it in the context of Classes 2 and 3, and that's true.  
25 However, the reasoning behind it was that Congress understood

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1 at that point how fictitious AWP was. So now I have to  
2 decide what impact that has with respect to Class 1. It's a  
3 really good debate, and I need to think about it.

4 MR. TRETTER: I think there's even another point,  
5 your Honor.

6 THE COURT: Which is?

7 MR. TRETTER: The statutes that the copays were  
8 made under differed. In the class that you certified and you  
9 kept it after summary judgment, the payments were made  
10 pursuant to the 1997 BBA, and AWP you said had an ambiguous  
11 meaning, it wasn't a term of art. In 2003 at the time there  
12 was also published ASPs, there was another statute, a totally  
13 different statute, that said "average wholesale price."

14 THE COURT: I'm sure it's a good argument, it's a  
15 great argument. I just have to think about it. I mean, I  
16 read it this morning at 9:00 o'clock. So it's a really good  
17 debate, and I don't need to resolve it right now because it  
18 doesn't matter a whole lot to whatever the trial is going to  
19 be.

20 MR. TRETTER: All right, can we talk then maybe  
21 about just the process with respect to this new plaintiff  
22 going forward because we can't wait till the eve of trial.

23 THE COURT: I understand. The other issue is, I  
24 don't think Sheet Metal has a similar interest, and I --

25 MR. TRETTER: You already denied that with respect

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1 to Schering. You said -- they tried to do the exact same  
2 thing with respect to Schering.

3 THE COURT: You know, this is so huge, maybe I did  
4 or maybe I didn't, but even coming to it afresh, they're  
5 validly part of Class 2. I forget, do we have any of these  
6 organizations who are class representatives also, the --

7 MR. TRETTER: They're out of the case.

8 THE COURT: Are they totally out?

9 MR. SOBOL: Well, for the damage claims, that's  
10 correct.

11 THE COURT: For damages, I know that, but did  
12 anyone stay in?

13 MR. BERMAN: Just I think there's not against BMS  
14 for -- well, let me back up. I think they're in on Class 2  
15 and 3 only for injunctive relief.

16 THE COURT: Okay, so none of them were with respect  
17 to Class 1.

18 MR. BERMAN: Right.

19 THE COURT: I couldn't remember. All right. So  
20 we'll add this woman. What kind of health is she in right  
21 now?

22 MR. BERMAN: Well, there's two ladies actually.  
23 One we mentioned, we think we've got the records ready, but  
24 we want to make sure. This woman, Ms. Swayze, has Stage 4  
25 ovarian cancer, and she's very sick, but she's very

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1 spirited. So we're going to try to gather the documents that  
2 we would normally have turned over as soon as we can. We're  
3 going to make her available for a deposition, and we're going  
4 to do this as a trial deposition because we don't know if  
5 she's going to be able to come to the trial. And we would  
6 hope that, given the relative lack of real knowledge that  
7 these people have over the issue, that BMS won't prolong this  
8 deposition for hours and hours.

9 MR. TRETTER: Not at all, your Honor. We're very  
10 uninterested in giving Ms. Swayze or anybody else a hard time  
11 in a deposition. We're not going to make arguments about  
12 whether you're sophisticated, whether you're -- we just want  
13 the paper trail that shows when they received their  
14 chemotherapy, whether they actually paid for the copay out of  
15 their own pocket, which is what Class 1 is about. We don't  
16 even need to bother her that much. We just need to bother --

17 THE COURT: Can we get an affidavit from her saying  
18 she paid herself and maybe some verification of the dates  
19 through the doctor's office and not have to get her at all?

20 MR. TRETTER: I think the doctor might be more  
21 interesting. Now --

22 THE COURT: Because, I mean, she's Stage 4. My lay  
23 understanding is that that's pretty bad.

24 MR. BERMAN: It's not good.

25 MR. TRETTER: Yes, look, I don't think that we

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1 would take more than a half an hour. I think the plaintiffs  
2 are saying they want her videotaped so that they can present  
3 it at trial.

4 THE COURT: Well, see what you can do, but at the  
5 very least, we must be able to get the doctor. She's  
6 probably been treating for a long time.

7 MR. BERMAN: Right, we're getting records, your  
8 Honor, from the Valley Tumor Medical Group right as we speak.

9 MR. TRETTER: Exactly. I just want the Court to be  
10 aware that a lot of times when the plaintiffs think they have  
11 it, they don't.

12 THE COURT: I fully -- we've seen that, and I think  
13 that's fair. It's just the reality is, there needs to be a  
14 class representative. This is a highly unusual case because  
15 people are so old and so sick, and by being old, their  
16 memories aren't fabulous.

17 MR. TRETTER: Understood.

18 THE COURT: So if we have to continue the trial to  
19 get there, we will.

20 MR. TRETTER: Okay.

21 THE COURT: But I don't know what to do on the 2004  
22 situation.

23 MR. TRETTER: We can brief that separately.

24 THE COURT: Nobody has -- well, I don't even know  
25 that you need much more briefing.

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1 MR. TRETTER: I don't think we do.

2 THE COURT: It's a really important and interesting  
3 issue.

4 MR. TRETTER: And I think the issue for your Honor  
5 is not so much what was going on in Congress' mind. The  
6 charge that you're going to give the jury is whether BMS was  
7 acting with intent to defraud, but you've got to realize that  
8 any AWP's that are published in the publication at that time  
9 are being published simultaneously with ASP's that are going,  
10 so the so-called true average is already out there.

11 THE COURT: You've got an excellent argument. My  
12 only point is, when you say I've ruled on it, sure, but it  
13 was in the context of 2 and 3, and I would be the first to  
14 say Class 1 wasn't in the forefront of my mind. So let me  
15 just think about it. You may say it was, but I'm telling you  
16 it was on the eve of trial on 2 and 3, and I wasn't -- and at  
17 least no one was flat-out vetting that. But the truth is,  
18 even if I were to allow another class, which I'm very dubious  
19 about at this point, I would have to subclass it because it  
20 would be a totally separate set of issues and a separate  
21 statute. So I'm just not inclined to do that right now, but  
22 let me think about it.

23 MR. TRETTER: That's fine. One thing to remember  
24 is that when the motion -- the motion practice on summary  
25 judgment went differently from the trial. One and 2 were

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1 done together, and your opinion says this applies to Class 1  
2 and Class 2. We moved as defendants, all Track One  
3 defendants, on Class 1 and 2 simultaneously.

4 THE COURT: I haven't refocused on it until 9:00  
5 o'clock this morning. It's a great issue. We're going to  
6 allow you, the plaintiffs, to add Mrs. Swayze. Ideally, if  
7 there's somebody else you want to try and add, you'll do it  
8 right away, and you'll just -- I know it's coming up on  
9 July 4 week, so I think July 4 -- when do we start this  
10 trial?

11 MR. BERMAN: July 23, your Honor.

12 THE COURT: July 23. So, ideally speaking, people  
13 will respect family time over July 4. So why don't I put a  
14 ban on depositions the week of July 4 so people can have some  
15 family life because the rest of July will be awful.

16 MR. TRETTER: I would like to have everything done  
17 before July 4. I would like to have the hard-copy documents  
18 or whatever it is by the end of this week.

19 THE COURT: You know, they'll do what they can do.  
20 You raised it two weeks ago.

21 MR. TRETTER: And the doctor, can we get --

22 THE COURT: I don't know. I don't know what the  
23 doctor's family plans are. You'll do what you can do.

24 MR. TRETTER: Can we have a deposition of the  
25 physician?

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1 THE COURT: I don't know. I mean, if we have clear  
2 documents, I don't see why you need --

3 MR. BERMAN: There have been no depositions of  
4 physicians in this case to date by any defendant.

5 THE COURT: Why don't you all get on the phone, and  
6 then if there's a real need for it -- I don't want to bother  
7 these people. If there's a crystal-clear paper trail, we'll  
8 go one way. If it's not a crystal-clear paper trail, we'll  
9 go on the phone. I'm sure the guy or woman would be willing  
10 to talk to you.

11 MR. TRETTER: Right, there may be issues why this  
12 EOB was not processed till 2007. It looks like it's a signed  
13 claim. I don't know what that means. There are all sorts of  
14 issues with respect to this --

15 THE COURT: It's a good point. We'll see. If you  
16 can figure it out beforehand, either up or down, if it's an  
17 ambiguity, just work out either a telephone deposition or  
18 something that just can clean it up.

19 MR. TRETTER: We'll try in the first instance. If  
20 we have any problem, we'll come back to you quickly.

21 THE COURT: Good. I will not be here the last week  
22 in June. I actually will be around July 4 week, but I think  
23 what we should -- I don't know, but I'm going to be away with  
24 my family the last week in June, so there it is.

25 Now, is that all we need to do?

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1 MR. TRETTER: I'd like to bring up two other  
2 issues, one minor and one major. The minor issue is the  
3 issue of the joint pretrial brief and the trial briefs, which  
4 I understand you waived for AstraZeneca, given your  
5 familiarity with the case. And we would ask, and I know we  
6 asked this and it was already denied once --  
7 THE COURT: Well, you didn't. You called Mr. Alba  
8 up on the phone. And even though he is a coequal member of  
9 the team, it's ideal to actually file a motion.  
10 MR. TRETTER: Well, we were doing this as an agreed  
11 motion of both sides, and I'd like to make it on the --  
12 THE COURT: Is it filed?  
13 MR. TRETTER: I'd like to make this motion orally  
14 right now.  
15 THE COURT: Allowed.  
16 MR. TRETTER: Thank you very much, your Honor.  
17 THE COURT: It's just Mr. Alba, as great as he is,  
18 he actually can't grant the motion on the phone. So  
19 basically that's fine. I don't need a pretrial memo.  
20 MR. TRETTER: Or individual trial briefs.  
21 THE COURT: Or individual trial briefs.  
22 MR. TRETTER: Thank you, your Honor.  
23 THE COURT: I don't need it. What I do need are  
24 witness lists. I mean, I need direction.  
25 MR. TRETTER: They're all coming in on Monday.

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1 THE COURT: Any motions in limine?  
2 MR. TRETTER: Monday.  
3 THE COURT: Good, good.  
4 MR. TRETTER: Now, here's one thing that I want to  
5 alert your Honor to that was not involved in AstraZeneca that  
6 is involved in BMS: multi-source drugs. AstraZeneca had one  
7 drug, Zoladex. There was no problem.  
8 THE COURT: I agree, that is a killer, and I'm  
9 sitting thinking about it in the other context as well as we  
10 speak. It's a very hard case.  
11 MR. TRETTER: We briefed this in connection with  
12 the Class 2 and 3, which is that the only damages with  
13 respect to BMS drugs are in the period where the drugs become  
14 subject to multi-source competition and they break the  
15 Hartman speed limit of 30 percent.  
16 THE COURT: By a lot.  
17 MR. TRETTER: By a lot, let's say, okay. Two  
18 points. You know, we think there are lots of things we're  
19 going to be arguing at trial about how multi-source drugs are  
20 different from single-source and the state of knowledge, and  
21 whether government intended multi-source drugs to have bigger  
22 spreads is one thing. But the issue that I want to raise  
23 today is an issue that no class plaintiff is able to show in  
24 the case of a multi-source drug that he or she was infused  
25 with a BMS version of the drug.

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1 THE COURT: Right, and I'm struggling with that  
2 actually in Classes 2 and 3, and the issue really is,  
3 let's -- I mean, I think that's actually one of the hardest  
4 legal issues in the litigation.  
5 MR. TRETTER: It is.  
6 THE COURT: I mean, there's lots of factually  
7 complex issues but in terms of a legal question. So let  
8 me --  
9 MR. TRETTER: And it raises a class issue too  
10 because they're proceeding on an alternative liability  
11 theory. If you look at their briefing in Class 2 and 3, they  
12 say, "Well, Massachusetts recognizes various theories of  
13 market share or joint and several," and we disagree with  
14 that.  
15 THE COURT: Why don't you come up with evidence of  
16 what your market share is so you can rebut full liability.  
17 You could if you wanted to.  
18 MR. TRETTER: Well, our point is, and we make this  
19 in our brief, is that even if you look at Massachusetts  
20 alone -- and now we have a multistate class -- no court has  
21 ever recognized it in the context of economic loss as opposed  
22 to a personal injury case. I mean, you have market share  
23 theories in lead paint and asbestos and things like that.  
24 Nobody's ever --  
25 THE COURT: I agree, it's been primarily product

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1 liability. As I said, it's one of the hardest, narrow  
2 questions. But if you look at the Restatement of Torts on  
3 apportionment, which you can tell I've been working on this  
4 particular issue, so the issue is really, if in fact, though,  
5 I'm working out of equity, 93A --  
6 MR. TRETTER: Well, but you're not because you're  
7 working now on many, many, many state statutes, and we've  
8 made this a case -- this is the grand bargain, remember. The  
9 grand bargain for Class 1 is that we're getting rid of the  
10 various state statutes, and we're going with a Restatement  
11 theory of basically common law fraud because deception runs  
12 across all the statutes.  
13 THE COURT: So take fraud. That's --  
14 MR. TRETTER: So we have to do fraud.  
15 THE COURT: You do fraud, and then if you do fraud,  
16 fraud --  
17 MR. TRETTER: Right, I'm with you.  
18 THE COURT: And then if you find a fraud, and then  
19 there's a common base but there's a way of making a divisible  
20 injury --  
21 MR. TRETTER: Now I'm losing you.  
22 THE COURT: In other words --  
23 MR. TRETTER: Let's take a --  
24 THE COURT: Let me just say, I don't intend to  
25 answer to this question, and I'll look forward to your



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1 briefing. As you can tell, I'm struggling with it in  
 2 Classes 2 and 3, but let me ask --  
 3 MR. TRETTER: It's a bigger issue in Class 1  
 4 because you have 40 states, all of which don't recognize  
 5 these same theories. The whole -- I understood the grand  
 6 bargain with respect to a single-source drug. You were going  
 7 to say: Okay, real deception cuts across all these states.  
 8 It rings the bell in every state's statute. Therefore we can  
 9 have a charge. And we're not like AstraZeneca. We're not  
 10 saying you can't do that.  
 11 THE COURT: What do you call it, the big bargain?  
 12 MR. TRETTER: The grand bargain.  
 13 THE COURT: The grand bargain.  
 14 MR. TRETTER: The grand bargain for the plaintiffs  
 15 was, we're going to have this unique situation because nobody  
 16 other than you has had a class action like this.  
 17 THE COURT: I think this is an incredibly important  
 18 issue. I'm struggling with it in the Class 2 and 3  
 19 93A in Massachusetts. I will look forward to your briefing.  
 20 I don't know what I'm going to do. But I do know one thing,  
 21 that at least you would be able to, as I understand under the  
 22 most gen -- is to demonstrate market share and reduce your  
 23 damages that way, and so I would suggest you put that in.  
 24 MR. TRETTER: Okay, we'll do that, but the thing is  
 25 that Dr. Hartman proceeds on a different basis. He doesn't

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1 care about market shares. He proceeds, he says, "Well, I  
 2 estimate that one million units of BMS product got into the  
 3 Medicare channel."  
 4 THE COURT: So let me turn to you. I'll obviously  
 5 take briefing on it. It's a serious issue. It's probably  
 6 the most serious legal issue in the case.  
 7 MR. SOBOL: Is there currently -- this is a  
 8 question not only to you, your Honor, but also to the parties  
 9 because I'm not actually aware of this. Is there currently a  
 10 vehicle by which this issue can be briefed, either in the  
 11 context of the upcoming trial or Class 2 or 3 further?  
 12 THE COURT: Well, I think Class 2 and 3 are gone,  
 13 too far gone on that.  
 14 MR. SOBOL: Okay, so that's what I assumed to be  
 15 the case.  
 16 THE COURT: But I am --  
 17 MR. SOBOL: So there should be, although the Court  
 18 has waived pretrial briefs by the parties, if the parties  
 19 wish to brief this issue before the jury trial, they may.  
 20 MR. TRETTER: We plan on doing an in limine  
 21 motion. They'll be getting our brief on Monday. I'm just  
 22 raising it right now to alert your Honor.  
 23 THE COURT: Well, it's a very serious, important  
 24 threshold issue.  
 25 MR. TRETTER: And the final point is, if we win on

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1 it, there are no damages in the case. It's something that  
 2 has to be resolved early. I'm raising it at this status  
 3 conference, which we appreciate, but basically if you get rid  
 4 of multi-source --  
 5 THE COURT: Suppose I were to do this, though. I'm  
 6 allowed to -- what would I do? I could move it into another  
 7 thing, another kind of class under another section. So I  
 8 could say class -- I'm thinking out loud, so think about  
 9 this. Let's say if you're not culpable, that's a classwide  
 10 finding.  
 11 MR. TRETTER: That's the fraud, the grand bargain  
 12 idea.  
 13 THE COURT: Yes, you're not culpable under fraud.  
 14 But if you are culpable but I find that it's impossible to  
 15 figure out damages state by state, can't I do a liability  
 16 finding? And then I could farm it out to the states, and  
 17 they could figure out damages?  
 18 MR. TRETTER: It's not a damages issue, your  
 19 Honor. The issue is whether somebody who cannot prove that  
 20 they received the good that is at issue --  
 21 THE COURT: That's where I might not be with you.  
 22 For me, the struggle is -- I'll hear you brief it. I'm  
 23 thinking as you're talking because I haven't thought about it  
 24 this way before. I think you could probably say, let's say,  
 25 Taxol, which is one of your great drugs, right? Everybody

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1 uses it?  
 2 MR. TRETTER: Absolutely.  
 3 THE COURT: It's one of the only ones I had  
 4 actually heard of before I came into this litigation.  
 5 MR. TRETTER: Right, breast and ovarian cancer, and  
 6 it's called paclitaxel, and it went generic in 2000.  
 7 THE COURT: All right, so I think that most states  
 8 would be able to say that if there was a finding of deceit  
 9 and fraud, that it was likely that they were injured, there  
 10 were consumers in their state injured, that there was someone  
 11 in -- what's your market --  
 12 MR. TRETTER: Well --  
 13 THE COURT: Excuse me. Will you let me finish?  
 14 MR. TRETTER: Yes, sure.  
 15 THE COURT: That there was somebody who was  
 16 injured. Then what's going to be a problem is, what are the  
 17 damages that flow from that? Now, you could probably figure  
 18 that out in a market share theory, if a state would recognize  
 19 that, on a probability basis, but you're right, it's cutting-  
 20 edge law. And so one way of doing it is putting to a jury --  
 21 I'm thinking out loud -- liability. If you're exonerated,  
 22 you're exonerated across the country. If you're found  
 23 liable, you could do intent to deceive, causation of some  
 24 harm to the state. And then if I find that I can't --  
 25 because this is one crop I hadn't thought of before when we

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1 were talking about certifying -- possibly doing something  
2 along the lines of sending it back to each state for an  
3 analysis of whether or not there's damages. Or I could do it  
4 myself, I suppose, but I'd just have to make a state-by-state  
5 evaluation.

6 And if I found as a court sitting in diversity,  
7 which is essentially what I am, that in most states -- not  
8 all states -- but I would have to do something along the  
9 lines of, if there was no state case law on it, I would  
10 either send it back to the state, or I would have to say that  
11 there's no law that supports that theory of recovery, and  
12 just do an injunction or something along those lines. I am  
13 open to suggestions.

14 MR. TRETTER: Okay. Sorry for stepping on your  
15 Honor. I do think that this is a threshold issue.

16 THE COURT: I do.

17 MR. TRETTER: It's not an issue of whether we  
18 committed bad acts and be punished for those bad acts. Most  
19 every state statute requires actual damage on the part of the  
20 plaintiff. This is not a parens patriae case where a state  
21 can come in and say, "We're punishing BMS."

22 THE COURT: Well, help me, though. Why couldn't  
23 they say by the statewide class, when you have something as  
24 well known or well used as Taxol, that it is likely that  
25 members of the consumer class were injured in the state of

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1 Kansas?

2 MR. TRETTER: Well, it's not a matter of  
3 likeliness.

4 THE COURT: Why, why?

5 MR. TRETTER: It's not a matter of whether somebody  
6 in Kansas likely received Taxol.

7 THE COURT: Why?

8 MR. TRETTER: It's a question of whether, when  
9 somebody comes to --

10 THE COURT: Someone in the class.

11 MR. TRETTER: Let's take it in the question of the  
12 class plaintiffs, for example. There's going to have to be  
13 some proof that they received the brand that is BMS's.  
14 Otherwise, they don't have actual damages.

15 THE COURT: Well, what if there was an 80 percent  
16 market share?

17 MR. TRETTER: They still have to prove it. What if  
18 they got --

19 THE COURT: Isn't it likely, if there's an 80  
20 percent market share, it was likely more than a 50 percent  
21 shot yours? I don't know. I'm going to think about those.  
22 I mean, I have no idea what your market share is.

23 MR. TRETTER: It depends on the drug.

24 THE COURT: I think it would make a difference to  
25 me if you were 2 percent market share. So I don't know.

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1 It's a great issue, and it's the thing we go to law school to  
2 do.

3 MR. BERMAN: And it's an issue, your Honor, I've  
4 been thinking about this --

5 THE COURT: Yes, I'd love to hear from you,  
6 Mr. Berman and Mr. Sobol.

7 MR. BERMAN: I mean, Mr. Tretter has been arguing  
8 his motion here.

9 THE COURT: Yes, it's good, it's a heads-up. So  
10 what do you think? Do you have actual --

11 MR. BERMAN: The one thing that he hasn't talked  
12 about that Dr. Berndt mentioned in his report, almost  
13 anticipated this, is the equity of a situation where the  
14 defendants can hide behind the anonymity of these J-Codes and  
15 say, "Look, you don't know for a fact it was our drug," and  
16 basically they can all get away with it. And a court sitting  
17 in equity, as you will be doing in part, when there's been a  
18 nationwide finding of fraud, assuming there is, we think --  
19 and we'll be glad to brief this -- there are lots of ways  
20 that you can in equity find damages on a statewide basis.

21 THE COURT: You know what, that's true under 93A  
22 and under equitable causes of action. My concern is that,  
23 and it's a well-made point by Mr. Tretter, that I'm sitting  
24 in common law when I do a fraud case. And so it's a good  
25 point. I just have to think about it.

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1 And it's not just market share theory, by the way.  
2 The Restatement of Torts deals with it under joint and  
3 several versus whether something's -- and I have been  
4 struggling with it because it's not so clear.

5 MR. TRETTER: This is Summer V. Tice, when you have  
6 two shooters -- and they talk about it in law school -- one  
7 bullet hits the victim.

8 THE COURT: Right.

9 MR. TRETTER: That you have to join both  
10 codefendants in the case. You can't have a theory where, "It  
11 was IVAX or BMS. I'm only going to sue BMS, and it was  
12 likely, because of their share, it was BMS." You have to  
13 have, even in the states that allow it --

14 THE COURT: Excuse me. That's only true -- I've  
15 been reading this stuff recently, so you've sort of got  
16 somebody in the middle of it. It's only true if it's an  
17 indivisible injury, like the guy died. What if somebody hit  
18 someone in the arm and the other hit someone in leg? Now,  
19 obviously this is personal injury. I'm going back to basics  
20 myself in thinking about it. What if you have somebody -- in  
21 any event, we have to work through what's a divisible injury,  
22 what's an indivisible injury, and I think this is a very  
23 difficult legal issue. And what makes it easier in  
24 Massachusetts is, I have one state's body of law.

25 MR. TRETTER: Right.

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1 THE COURT: You're right that I have to think about  
 2 it in the context of 48 states.  
 3 MR. TRETTER: Well, maybe we should just just await  
 4 the briefing, your Honor.  
 5 MR. SOBOL: Obviously we'll brief whatever it is  
 6 that Mr. Tretter wants to file. I will remind your Honor of  
 7 our fundamental position on this issue, which is that this  
 8 case is about conduct, not product. And to use sort of a  
 9 Johnnie Cochran type phrase, we have to go back to this.  
 10 It's BMS's conduct at issue --  
 11 THE COURT: You're quoting Johnnie Cochran?  
 12 MR. SOBOL: It's conduct, not product.  
 13 MR. DWYER: The late.  
 14 MR. SOBOL: The late Johnnie Cochran.  
 15 THE COURT: Does he, like, have a treatise or --  
 16 MR. SOBOL: Well, he doesn't, but --  
 17 MR. DWYER: He's the treatise.  
 18 MR. SOBOL: In this case, what BMS would like to do  
 19 is say that you have to prove that the consumers consumed our  
 20 product in order to find liability. But that's not what the  
 21 case is about. The case is about BMS's deception in terms of  
 22 the AWP that caused increased inflation regardless of the  
 23 product that they purchased. And that's not novel. That's  
 24 classic consumer protection and fraud law. If somebody came  
 25 along and lied to me about somebody else's product, and, as a

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1 result, I bought that product, the person who lied to me upon  
 2 whom I relied would still be liable, even though I did not  
 3 buy that person's product.  
 4 THE COURT: Right, and you made that argument,  
 5 that's your theory of joint and several liability, but it  
 6 only works with an indivisible injury. And here you've got a  
 7 market which is divisible in the sense that someone bought  
 8 Company X's product. I know your position. You argued it  
 9 the last time. I'm simply saying, Mr. Sobol, I don't know  
 10 what I'm going to do. It's a really cutting-edge issue. I  
 11 guarantee, though, there will be a trial. Whether I do it on  
 12 the whole shmeer -- that's a legal term -- or just on part of  
 13 it, I don't know. I have to -- because one way or another,  
 14 this case has been going so long in the MDL, this will either  
 15 settle or go to trial. We'll have a jury finding on the  
 16 intent to deceive, as you say, conduct.  
 17 MR. SOBOL: Conduct.  
 18 THE COURT: You'll have a jury finding on  
 19 causation. Whether I can adequately under -- he's taking  
 20 down every word I've got. I can hear him typing.  
 21 MR. BERMAN: Sorry, your Honor.  
 22 THE COURT: Whether I can do a damage situation, I  
 23 don't know. And I'm glad you raised the issue, and I'll have  
 24 to think about it. I suggest you all help me by mucking  
 25 through the Restatement of Torts because I think it's that

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1 basic. Most states follow that, and it's at least something  
 2 that I could look at across the states to see what I could do  
 3 on this.  
 4 MR. SOBOL: When we do brief it, your Honor, I just  
 5 want to make clear that our position in terms of it being the  
 6 conduct, not the product, is not an interpretation of joint  
 7 and several liability. That's an entirely different issue in  
 8 the case, from our perspective. It is the case that if a  
 9 defendant on their own -- and it's immaterial whether there  
 10 were other defendants who also happened to have been  
 11 committing a tort at the time. Independently of that, if a  
 12 defendant commits conduct that someone relies upon to their  
 13 damage, regardless of whether other people did the same thing  
 14 or not, they are responsible, period.  
 15 THE COURT: For what? It's the whole what?  
 16 MR. SOBOL: For the conduct, for the damages that  
 17 was the proximate cause of the lie.  
 18 THE COURT: Suppose you have 29 generic  
 19 multi-source manufacturers of drugs.  
 20 MR. SOBOL: Right.  
 21 THE COURT: And one of them is late in the market,  
 22 lies about his price, but is below median and only has  
 23 2 percent market share. You're going to say I'm going to  
 24 impose the entire liability on him?  
 25 MR. SOBOL: If you can prove -- and this is what

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1 the law says in terms of conduct -- the plaintiffs' burden is  
 2 to prove that the defendant's wrongful acts were a  
 3 substantial contributing factor to --  
 4 THE COURT: How can that by law be a substantial  
 5 contributing factor?  
 6 MR. SOBOL: It probably would not be.  
 7 THE COURT: Okay, I'm just saying it's not so  
 8 simple.  
 9 MR. SOBOL: I agree, but the construct is the  
 10 causation, substantial contributing factor. It's not joint  
 11 and several on that conduct versus product theory. That's  
 12 all the point I was trying to make, and we will brief it.  
 13 THE COURT: So, Mr. Dwyer?  
 14 MR. DWYER: One last point on the Bristol side.  
 15 Preparing the voir dire questions and the proposed  
 16 questionnaire --  
 17 THE COURT: I know a practical suggestion.  
 18 MR. DWYER: -- on a case with oncology drugs raises  
 19 a lot of difficult issues, not just issues that -- there are  
 20 nonprivacy questions which I think we should be entitled to  
 21 get, and I think then obviously there are privacy questions.  
 22 THE COURT: I think we should eliminate anyone who  
 23 either themselves or a close family member took these drugs.  
 24 MR. DWYER: Right.  
 25 THE COURT: So I think I can ask that without --



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1 MR. DWYER: Or a coworker, I was thinking also  
 2 coworker, close friend.  
 3 THE COURT: Well, propose a few of those. I mean,  
 4 I think we've got to be able to discuss -- are most of them  
 5 breast cancer and what else?  
 6 MR. TRETTER: No. There are some that are  
 7 testicular. You know, the Etoposide is used for other  
 8 things. So, I mean, there are all sorts of things, head and  
 9 neck. You've got a lot.  
 10 MR. DWYER: I think one of the other things that  
 11 we're just trying to raise and see what your reaction is  
 12 today as we get these papers ready for Monday is, then you  
 13 have a whole class of people who either themselves are  
 14 beneficiaries of some government program, or a child with  
 15 disability government program, or a mother, you know --  
 16 THE COURT: Sure.  
 17 MR. DWYER: So we've got this whole category of  
 18 people again who are going to bring this whole government  
 19 benefit claim issue into the jury room in a way -- does that  
 20 sound like something that --  
 21 THE COURT: We need voir dire questions on that. I  
 22 may not necessarily exclude them from the jury, but we'd want  
 23 to know about them.  
 24 MR. DWYER: Right.  
 25 THE COURT: So you put through your voir dire, and

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1 I'll see what makes sense, because I didn't have to actually  
 2 walk through this with AstraZeneca, and that was only one  
 3 drug, and these are multi-drugs.  
 4 But can I jump to Mr. Sobol and Mr. Berman. As we  
 5 were going through the other case, it wasn't clear to us that  
 6 all the drugs -- you don't even discuss all of them with  
 7 Bristol-Myers.  
 8 MR. TRETTER: There's a zero --  
 9 THE COURT: There are about three that you don't do  
 10 much with.  
 11 MR. TRETTER: There's a zero for damages under  
 12 Dr. Hartman's calculation for something called Blenoxane. He  
 13 zeros that out.  
 14 THE COURT: Yes, so there are a bunch like that,  
 15 and so -- well, not a bunch but two or three where it was  
 16 really questionable, even under the Hartman speed limit. So  
 17 I think you need to relook through those drugs and see, just  
 18 so that I'm not spinning my wheels on it and it's not  
 19 confusing, all these names, to a jury when I'm asking these  
 20 questions. I don't want to ask people questions about  
 21 diseases that they have if I'm going to end up directing them  
 22 out. So I can't remember exactly which they were, but there  
 23 were two or three that were very marginal cases under the  
 24 speed limit.  
 25 MR. BERMAN: Okay, we'll take a look at that, your

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1 Honor.  
 2 MR. DWYER: Can I raise another practical issue?  
 3 THE COURT: Yes.  
 4 MR. DWYER: Whether it's a voir dire question or  
 5 it's a questionnaire, someone says that their wife is being  
 6 treated for breast cancer. I know your usual practice is not  
 7 even to entertain the questionnaires, and I know you're  
 8 entertaining at least the thought of it in this case. Have  
 9 you thought about what your preference would be if the person  
 10 says "yes"? Where do we go if the person either raises their  
 11 hand to a voir dire question or it's on a questionnaire?  
 12 Have you thought whether you're going to do a lobby inquiry?  
 13 THE COURT: I haven't thought about it at all, and  
 14 I think you can raise it. I mean, I think the reality is, if  
 15 somebody's actually taking a drug at issue, they should be  
 16 off the jury. But if someone's wife has just simply had  
 17 breast cancer and they don't know what drug they used or they  
 18 used a different drug, I don't think that's, at least my  
 19 initial instinct, an automatic disqualifier, as long as they  
 20 look me in the face and say they can be fair and impartial.  
 21 You can challenge them on a peremptory, but I don't know if  
 22 that's for cause just because -- I mean, almost everybody  
 23 knows somebody who's had some form of cancer. I wouldn't  
 24 have a jury.  
 25 MR. DWYER: Well, if in that particular example you

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1 just talked about, you'd have the issue of the copay  
 2 potentially coming out of the household budget, so again you  
 3 have a --  
 4 THE COURT: But if it's a different drug, I don't  
 5 know. I'll hear you. I don't know. I don't know that I'd  
 6 make that an automatic for cause if it was a different drug.  
 7 I'd want to hear about whether they thought they could sit  
 8 fairly, though. I mean, between breast, lung, ovarian,  
 9 prostate, don't we all know people? So we'd have to be more  
 10 discrete about that. But I'm willing to entertain -- I'm  
 11 open. See what you can do.  
 12 When I've done questionnaires in the past, I've  
 13 limited it to one page so it's simple, and I have them do it  
 14 right in front of me. I do it particularly in child  
 15 pornography cases or race cases because sometimes people are  
 16 embarrassed to say certain things; like, you know, do you  
 17 have problems with someone of a different race, or do you  
 18 have any problems that would prevent you from sitting on a  
 19 child pornography case? I suppose we could just ask somebody  
 20 in writing whether or not they have any problems sitting on a  
 21 case involving drugs involved with cancer. We'll see what we  
 22 can do. Have you thought through your voir dire questions?  
 23 MR. SOBOL: Steve?  
 24 MR. BERMAN: Well, we submitted a questionnaire for  
 25 the AstraZeneca trial, your Honor. It's about two pages, and

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1 we think we pretty much have the same questions here.  
 2 THE COURT: Okay. Well, we'll have to go find it.  
 3 One of the problems is, we're up to 4,400 or 4,300 docket  
 4 entries in this. So what's really useful -- and they're  
 5 coming in in all sorts of cases at this point. I'm looking  
 6 at Mr. Haviland because I have to tell you, I did not read  
 7 your objections before I did that preliminary approval. You  
 8 filed them, I don't even know --

9 MR. HAVILAND: That morning, your Honor.

10 THE COURT: That morning. We hadn't even  
 11 downloaded it. You can't expect that I'm going to instantly  
 12 review that docket and grab them on everything. So some of  
 13 those objections actually were interesting and something I'm  
 14 going to want to think about at the final settlement  
 15 conference.

16 MR. HAVILAND: I appreciate that, your Honor.

17 THE COURT: But, you know, if you're going to file  
 18 something an hour before a hearing, even with CM-ECF, you've  
 19 got to give us a call and let us know.

20 MR. HAVILAND: Your Honor, actually, in that  
 21 situation we didn't know that the filing was coming that we  
 22 responded to. We had about a 24-hour turnaround, so we did  
 23 the best to get those issues so the Court could have it for  
 24 preliminary approval --

25 THE COURT: But even if you had a paralegal make a

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1 phone call to the clerk saying, you know, "Be watching."

2 MR. BERMAN: And, your Honor, we're filing a  
 3 response to Mr. Haviland's position today because you've  
 4 referred it to the magistrate, and --

5 THE COURT: I have?

6 MR. BERMAN: And Professor Green has also filed  
 7 something.

8 THE COURT: If I have, I didn't mean to.

9 MR. SOBOL: Yes, it made no sense, your Honor.

10 MR. BERMAN: Well, I think there is a docket entry  
 11 referring that to the magistrate.

12 THE COURT: Referring what?

13 MR. HAVILAND: I think Mr. Berman is talking about  
 14 something else. The issue your Honor was addressing was the  
 15 AstraZeneca settlement and our statement as to the  
 16 preliminary approval, which your Honor did need a brief on --

17 THE COURT: Excuse me. I thought what I referred  
 18 to a magistrate judge was the disagreement between class  
 19 counsel over your respective roles on the team. That's  
 20 different from the objections to the preliminary approval in  
 21 AstraZeneca, which I have to candidly say I did not read  
 22 before I walked out there. I didn't know about them. And  
 23 you never said anything at the proceeding, right?

24 MR. HAVILAND: Your Honor, I wasn't there. I had  
 25 gone on vacation, as I had reported to your Honor. We didn't

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1 know the timetable. It got filed -- the hearing wasn't even  
 2 scheduled on the docket, so it all happened very, very  
 3 quickly. The pleading got filed. The hearing took place  
 4 sometime that morning. We turned the brief around in about  
 5 twelve hours just to get the positions that had been  
 6 discussed --

7 THE COURT: Well, you could have moved for  
 8 reconsideration. None of the notices had gone out. In any  
 9 event, I'm just saying for the record I hadn't read it,  
 10 so -- and no one here was saying anything, and I -- some of  
 11 the points I don't necessarily agree with, but some of them  
 12 seem like something I'll want to think about, and so --

13 MR. HAVILAND: We made the points to  
 14 Special Mediator Green as well, just to try to get them  
 15 addressed so that it didn't become an outside-the-settlement  
 16 issue. The particular problem we had, your Honor, is that  
 17 the named class representative was not getting a full  
 18 recovery, and she's entitled to it. It was overlooked.

19 THE COURT: Well, skip her for a minute because  
 20 she's supposed to represent the whole class. Some of the  
 21 issues were well taken; you know, why don't I increase the  
 22 moneys going to class members rather than going to a cy pres  
 23 fund. I mean, that's a good point.

24 MR. HAVILAND: We think send checks, your Honor,  
 25 just send them.

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1 THE COURT: Or just send checks. I can deal with  
 2 that at the final analysis. But as far as your -- you're  
 3 separately representing the 2004 person, right?

4 MR. HAVILAND: Could I address just one point on  
 5 that, your Honor? Your Honor talked about the summary  
 6 judgment. I just want to make sure. I do represent the  
 7 Aaronsons, and unfortunately Mrs. Aaronson passed away a few  
 8 months ago, and her husband is very committed to this case.  
 9 He was deposed twice. He expects to be at trial. It's his  
 10 case. He stepped up two years ago to prosecute this case.

11 THE COURT: Well, he may well be able to be a  
 12 witness, but in terms of -- but let me just say, I think  
 13 there's a serious issue here. It's at least a different  
 14 statute, and --

15 MR. HAVILAND: And, your Honor, what we don't think  
 16 got presented at the time it was briefed because of the  
 17 context of the trial, the TPP trial, very late in the  
 18 knowledge issues, the consumers were very -- it was kind of  
 19 like at the beginning of your Honor's opinion, and then the  
 20 briefing never addressed consumers, the role of consumers,  
 21 the consumer fraud laws that we're suing under and whether or  
 22 not this could be an absolute bar to recovery. It was more  
 23 in the nature of an advisory opinion as we read it from the  
 24 consumers' standpoint.

25 THE COURT: Well, let me say this: There's a very

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1 serious legal question here. So if I don't have her as part  
2 of the class, that doesn't mean that they can't still sue.  
3 It just means it's a separate legal question that's not  
4 common to the class.

5 MR. HAVILAND: Fair enough, for the '04 folks,  
6 understood, your Honor.

7 THE COURT: For the '04 folks. So maybe they could  
8 just -- it means that there's no class, I'm not certifying a  
9 class, so you could probably enter into your own settlement,  
10 if that's what the issue happens to be, or I could carve it  
11 off and send her back to North Carolina.

12 MR. HAVILAND: The other issue that we put in our  
13 original paper and then we saw class counsel's filing is  
14 about the Sheet Metal Workers. We absolutely agree with your  
15 Honor. You've ruled on that time and again. We don't think  
16 it's appropriate at this juncture to have a TPP come in for  
17 the Class 1 consumers. There's just so many issues right now  
18 between those two groups that to have an existing TPP, for  
19 which your Honor did rule back in November, substitute in,  
20 but I think your Honor's already decided that.

21 THE COURT: It's interesting whether the class  
22 action vehicle actually works for a class like this, where by  
23 definition everyone is so old and so sick. You know, I know  
24 the Supreme Court said that organizations shouldn't be  
25 allowed to be class representatives for the most part, you

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1 know, unless you can prove that individual members took it;  
2 but I must say we've had a lot of class plaintiffs die just  
3 in the course of this, so it's not an ideal scenario for  
4 anybody.

5 MR. HAVILAND: It works for this reason: That the  
6 consumers, the cancer patients, are the ones these defendants  
7 screwed the most. They're the ones they do not want in this  
8 courtroom testifying about what Reverend Aaronson told me  
9 last night, the \$13,000 bills he had to see while his wife  
10 was dying in hospice. That's the testimony they do not want  
11 to have. To have it just be a commercial case, the jury  
12 would never get a sense of that. Or if a TPP and the  
13 representative that was proffered said, "We just passed those  
14 damages on," there's just not the same flavor. That's what  
15 the class action vehicle is all about, to help these folks,  
16 these folks that have no voice.

17 So I respect your Honor, believe me, more than  
18 anyone, having to deal with many, many clients dying and the  
19 widows and widowers. It's very difficult to take those phone  
20 calls and to continue to work with the clients.

21 THE COURT: I agree. I'm just simply saying that  
22 it's just a sense of frustration I have because we're going  
23 to have to deal with this right up against trial, but that's  
24 what we're going to have to do.

25 You said you had possibly another one, is that

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1 right, Mr. Berman?

2 MR. BERMAN: Yes, we do, your Honor. We have a  
3 woman from Michigan who told us that she made out-of-pocket  
4 payments. We didn't want to represent to the Court that she  
5 was good until we actually saw the documents, but we're  
6 working on that as well.

7 THE COURT: All right, so you'll get that as soon  
8 as possible. Is she a little healthier?

9 MR. BERMAN: I think she is a little healthier. I  
10 think she may actually be able to come, but I don't want to  
11 represent that until I get a little better feel for her  
12 health.

13 MR. SOBOL: If I may, your Honor, there's an issue  
14 that I'm not sure whether or not Mr. Berman and I want to  
15 address. I just sent him an E-mail about it. I want to ask  
16 if he could just take a look at that because it's important  
17 before now that --

18 (Pause.)

19 MR. BERMAN: Yes, I think you should raise that,  
20 Tom.

21 MR. SOBOL: So I think the issue then, in terms of  
22 Aaronson, Mr. Haviland's client, is that I think that we  
23 should deal with it in briefing, in the context of the  
24 briefing in the '04 issue, the question as to whether or not  
25 Aaronson will or will not be representing the class as a

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1 whole or only herself. If she goes forward and she with  
2 others is representing the class as a whole, then it makes  
3 sense for them all to go forward with the trial in the end of  
4 July. On the other hand, if you rule that the particular  
5 circumstances of her having an '04 claim are sufficiently  
6 different from the balance of the class, then, as class  
7 counsel, we would say that we would carve off Ms. Aaronson's  
8 claim and proceed forward with the class trial with the  
9 substitute representatives for '03 and beforehand.

10 THE COURT: All right, let me defer on that. We'll  
11 see where all this is going, and I need to think about the  
12 big issue.

13 MR. SOBOL: Right. I just wanted to make sure.  
14 That's an issue we obviously need to resolve before we get to  
15 impaneling the jury, that's all.

16 MR. HAVILAND: Your Honor, just to impress the  
17 gravity of that big issue, Mrs. Aaronson is the lone class  
18 representative for the GSK classwide settlement, a very, very  
19 important issue to us. We believe she had standing at the  
20 time, and I would not want to see that undermined by anything  
21 that comes in the wake of all this briefing that took place  
22 in the class TPP context, and then all of a sudden we get to  
23 this eleventh hour and, "Oh, consumers have no rights in  
24 '04," without fulsome briefing because it's a serious  
25 question.

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1 THE COURT: You might want to be looking for  
2 another GSK representative to head that off.

3 MR. TRETTER: I'm a little bit confused. I had  
4 thought that Ms. Aaronson was being substituted for, that was  
5 the upshot of what we said in the first five minutes.

6 THE COURT: In the first five minutes, they were  
7 going to add one, maybe two class representatives, and I took  
8 under advisement the very serious argument that she should  
9 not be the class representative.

10 MR. TRETTER: There was also a summary judgment  
11 motion that was made before your Honor's opinion with respect  
12 to Mrs. Aaronson. BMS made a summary judgment motion on  
13 Class 1 on two grounds: One is, she was treated in a  
14 hospital, Presbyterian Hospital. The second is that she  
15 received a charge, a hospital charge, and she paid 20 percent  
16 of the hospital charge. And we put in an affidavit that the  
17 hospital did not charge based on AWP. So her 20 percent was  
18 paid on the hospital charge, and the hospital said no AWP.  
19 So there are separate issues --

20 THE COURT: The hospital said that they didn't pay  
21 based on AWP?

22 MR. TRETTER: They didn't charge based on AWP. In  
23 other words --

24 THE COURT: You know what, I have no memory of this  
25 whatsoever.

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1 MR. TRETTER: It's in our brief. I cite you our  
2 brief.

3 THE COURT: The new brief?

4 MR. TRETTER: No. This is back -- we have an issue  
5 of Mrs. Aaronson.

6 THE COURT: You know, I don't have recall.

7 MR. TRETTER: I understand.

8 THE COURT: So do you remember what docket number  
9 this was?

10 MR. TRETTER: I can give you the date of it, your  
11 Honor, and I can give you the title. This is BMS defendant's  
12 reply memorandum of law in support of their motion for  
13 summary judgment dated April 28, 2006. So there are issues  
14 with respect to Ms. Aaronson that go beyond 2004. And what's  
15 going to happen, if she were actually here at trial or  
16 Reverend Aaronson were here at trial, we would say, for  
17 instance, "Reverend Aaronson, your wife actually received the  
18 treatment in a hospital, not in a doctor's office, correct?"

19 THE COURT: I'm glad you reminded me. All right,  
20 let's go off the record.

21 MR. HAVILAND: Your Honor, if I may just on the  
22 record, just as a response to that? Your Honor got this  
23 exact same argument in class certification. We showed you  
24 EMBs, EOMBs in processing, so it's been resolved.

25 THE COURT: I don't remember. Did I expressly

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1 resolve it?

2 MR. TRETTER: No.

3 MR. HAVILAND: You made her a class representative  
4 based on that proffer that she still paid based on AWP.

5 THE COURT: You know, that was maybe three law  
6 clerks ago. I just don't even remember it. There were  
7 hundreds of, I'd say, technical -- and I don't mean that in a  
8 negative way -- objections to all the class representatives,  
9 and at some point we walked through that, and I don't  
10 remember. I don't remember the issue. I don't remember if I  
11 ruled on it. I remember nothing.

12 MR. TRETTER: All I'm suggesting, your Honor, is,  
13 there are a lot of reasons why Reverend Aaronson should not  
14 represent this class because what's going to happen at the  
15 end of the day, whether it's 2004 or some other reason,  
16 there's going to be no claim, just, you know, adjudication on  
17 the merits.

18 THE COURT: It's a serious issue. Let's go off the  
19 record.

20 (Discussion off the record.)

21 (Adjourned, 10:55 a.m.)

# 1 C E R T I F I C A T E

2  
3 UNITED STATES DISTRICT COURT )  
4 DISTRICT OF MASSACHUSETTS ) ss.  
5 CITY OF BOSTON )  
6  
7

8 I, Lee A. Marzilli, Official Federal Court  
9 Reporter, do hereby certify that the foregoing transcript,  
10 Pages 1 through 44 inclusive, was recorded by me  
11 stenographically at the time and place aforesaid in Civil  
12 Action No. 01-12257-PBS, MDL No. 1456, In re: Pharmaceutical  
13 Industry Average Wholesale Price Litigation, and thereafter  
14 by me reduced to typewriting and is a true and accurate  
15 record of the proceedings.

16 In witness whereof I have hereunto set my hand this  
17 8th day of June, 2007.  
18  
19  
20  
21  
22

23 /s/ Lee A. Marzilli

24 LEE A. MARZILLI, CRR  
25 OFFICIAL FEDERAL COURT REPORTER